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Availability of Disparate Impact Theory to Attack a Multicomponent Employment System

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AVAILABILITY OF DISPARATE IMPACT THEORY TO ATTACK A MULTICOMPONENT EMPLOYMENT SYSTEM

In the last two decades there has been a fundamental change in employment practices due to the Government's enactment of statutes prohibiting job-related discrimination.[1] One of the most significant pieces of federal legislation, title VII of the Civil Rights Act of 1964 (title VII),[2] prohibits an employer from denying an individual equal employ-

1. Follett & Welch, *Testing for Discrimination in Employment Practices*, LAW & CONTEMP. PROBS., Autumn 1983, at 171. The first major federal legislation prohibiting a private employer from discriminating against employees based on race, color, religion, sex, or national origin was title VII of the Civil Rights Act of 1964 (title VII). 42 U.S.C. §§ 2000e to 2000e-17 (1982). Commentators have noted the main focus of title VII was racial discrimination. Z. FASMAN, M. ALBUM & T. GIES, EQUAL EMPLOYMENT AUDIT HANDBOOK 69-70 (1984) [hereinafter cited as M. ALBUM & T. GIES]. The prohibition against sex discrimination was not added to the statute until a day before the law was passed. *Id.* at 70. The first kind of discrimination to be viewed by courts as prohibited under title VII was intentional mistreatment of a protected individual or class (disparate treatment). B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1-2 (2d ed. 1983). The most significant evolution of title VII since its inception was the courts' expansion of discrimination to include neutral employment practices having an adverse impact on protected classes of employees (disparate impact), and practices which preserve the effects of past discrimination. *Id.*

A second federal law prohibiting employment discrimination is the National Labor Relations Act (NLRA). 29 U.S.C. §§ 151-69 (1982). The NLRA states that its purpose is to promote "the practice and procedure of collective bargaining" and to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." *Id.* § 151. The provisions of the NLRA prohibit discrimination. Under § 8(a)(3) it is unlawful for an employer "by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization." *Id.* § 158(a)(3). Section 8(b)(2) prohibits discrimination by Unions. *Id.* § 158(a)(4). Finally, under § 8(a)(4) it is unlawful for an employer to "discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." *Id.* § 158(a)(4). For a further discussion of the NLRA as it relates to employment discrimination, see L. MADJESKA, HANDLING EMPLOYMENT DISCRIMINATION CASES § 7.1-7.2 (1980); 1 C. MORRIS, THE DEVELOPING LABOR LAW ch. 7 (2d ed. 1983). For a discussion of the history of the NLRA, see R. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 1-6, 21-22 (1976).

In addition, other major federal laws prohibit employment discrimination based on criteria not specifically addressed under title VII. *See* Rehabilitation Act of 1973, 29 U.S.C. § 794(d) (1983) (prohibiting employers from discriminating based on mental or physical handicap); Equal Pay Act of 1963, 29 U.S.C. § 206(a) (1983) (prohibiting employers from maintaining wage differentials based upon sex); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1983) (prohibiting employers from discriminating based upon age).

2. 42 U.S.C. § 2000e to 2000e-17 (1982). The Civil Rights Act is comprehensive in scope, providing protection against a wide range of discriminatory acts. *See id.* §§ 2000e to 2000h-6 (1982). In particular, title VII of the Civil

ment opportunities because of race, color, religion, sex, or national origin.[3] The primary purpose of title VII is "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."[4] However, while title VII prohibits intentionally discriminatory hiring and promotion practices, it does not prohibit practices that unintentionally favor certain classes of individuals, as long as the criteria are related to job performance.[5] This is the so-called "business necessity" exception to title VII.[6]

The Government's concern with employment discrimination has produced a vast amount of litigation.[7] Much of the litigation has focused on the fundamental question of how an employee proves discrimination. One controversial aspect of this issue involves whether an employee can use the disparate impact theory of discrimination to attack a multicomponent employment system generally,[8] on the ground that

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Rights Act of 1964 prohibits discrimination in employment. *See id.* § 2000e to 2000e-17.

3. *Id.* § 2000e-2(a). Under the express terms of title VII it is unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

4. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (citations omitted).

5. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). In *Griggs*, the Supreme Court stated:

> Congress did not intend by Title VII . . . to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.

Id. at 430-31.

6. For a discussion of the business necessity defense, see *infra* note 30 and accompanying text.

7. Follett & Welch, *supra* note 1, at 172. Follett and Welch note that the budget of the Equal Employment Opportunity Commission (EEOC) increased from $3 million in 1966 to $142 million in 1981. Between 1971 and 1981 the number of civil rights cases tried by federal courts nearly quadrupled to 13,750 per year. *Id.*

8. The term "employment system" is used throughout this note to describe the multicomponent process that an employer uses to make its selection, promotion, job allocation, and salary decisions. A specific component or criterion of the employment system, for instance, a written test, will be referred to in this note as an "employment criterion" or "employment practice."

the entire system violates title VII.[9] Under the disparate impact theory, facially neutral employment practices that have a disparate impact upon a protected class are prohibited by title VII unless the employer can prove that such practices are justified by a business necessity.[10] The disparate impact theory traditionally has been used to challenge single identifiable components of an employment system, such as written tests or particular height and weight restrictions.[11] In the seminal case of *Pouncy v. Prudential Insurance Co.*[12] the Fifth Circuit held that the dispa-

9. There is also a split among the circuits as to whether disparate impact theory may be utilized to challenge subjectively based or highly discretionary employment practices, for example, an evaluation based on an oral interview. *Compare* Griffin v. Carlin, 755 F.2d 1516, 1523 (11th Cir. 1985) (disparate impact theory is applicable to subjective employment criteria); Segar v. Smith, 738 F.2d 1249, 1288 n.34 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2357 (1985); Rowe v. Cleveland Pneumatic Co., 690 F.2d 88, 95 (6th Cir. 1982); Clark v. Chrysler Corp., 673 F.2d 921, 923 (7th Cir.), *cert. denied*, 459 U.S. 873 (1982); Williams v. Colorado Springs School Dist., 641 F.2d 835, 842 (10th Cir. 1981) *with* Antonio v. Wards Cove Parking Co., 768 F.2d 1120, 1131 (9th Cir. 1985) (disparate impact theory is not applicable to subjective criteria); Talley v. United States Postal Serv., 720 F.2d 505, 507 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 2155 (1984); Pouncy v. Prudential Ins. Co., 668 F.2d 795, 799-800 (5th Cir. 1982); Pope v. City of Hickory, 679 F.2d 20, 22 (4th Cir. 1982). Recently, the Fifth Circuit appears to have retreated from its position that disparate impact analysis is inapplicable to subjective employment practices. *See* Page v. United States Indus., Inc., 726 F.2d 1038, 1046 (5th Cir. 1984). For a discussion of *Page*, see *infra* note 59 and accompanying text. A number of labor law scholars have addressed the use of disparate impact theory to challenge subjectively based employment decisions. *See generally* M. ALBUM & T. GIES, *supra* note 1, at 83-87; B. SCHLEI & P. GROSSMAN, *supra* note 1, at 1289 ("three-stage adverse impact model is inapplicable since in an 'excessive subjectivity' case, if adverse impact is established, there is no specific employment requirement such as a test or an education requirement which the employer can establish is job related"); Rigler, *Title VII and the Applicability of Disparate Impact Analysis to Subjective Selection Criteria*, 88 W. VA. L. REV. 25 (1985); Willborn, *The Disparate Impact Model of Discrimination: Theory and Limits*, 34 AM. L. REV. 799, 831-33 (1985).

The issues of the applicability of disparate impact analysis to attack multicomponent employment systems and subjective employment criteria are often interrelated, since multicriteria employment systems often contain subjective components.

Even if it is determined that only objective employment criteria are appropriately challenged under the disparate impact model, subjective criteria are still subject to attack under the disparate treatment theory. B. SCHLEI & P. GROSSMAN, *supra* note 1, at 191.

10. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). The disparate impact theory of discrimination was first developed in *Griggs*. Prior to the *Griggs* decision, most courts required plaintiffs to prove intentional discrimination in order to establish a violation of title VII. B. SCHLEI & P. GROSSMAN, *supra* note 1, at 2. For a further discussion of *Griggs*, see *infra* notes 25-27 and accompanying text. For a discussion of the business necessity defense, see *infra* note 29 and accompanying text.

11. For a discussion of the traditional use of disparate impact theory, see *infra* note 72-74 and accompanying text.

12. 668 F.2d 795, 799-802 (5th Cir. 1982). For a discussion of *Pouncy*, see *infra* notes 42-53 and accompanying text.

rate impact theory could not be taken beyond its traditional context to challenge a multicomponent employment system as a whole.[13] To date, five circuits have embraced the *Pouncy* view.[14] However, two other circuits have ruled that the theory may be used to challenge a multicomponent employment system.[15]

The Supreme Court and the remaining circuits have not yet adopted a position on this issue. Thus, there is a need to determine whether, theoretically and practically, it is appropriate to use the disparate impact theory to challenge an employment system as a whole, rather than challenging single, identifiable elements of that system.

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13. 668 F.2d at 799-802. Under the *Pouncy* view, a multicomponent hiring system would not be subject to general attack based on a disparate impact analysis, but a specific component of that system would be subject to such an attack. *Id.*

14. *See* American Fed'n of State, County & Mun. Employees v. Washington, 770 F.2d 1401, 1405-06 (9th Cir. 1985); Robinson v. Polaroid Corp., 732 F.2d 1010, 1014 (1st Cir. 1984); EEOC v. Federal Reserve Bank, 698 F.2d 633, 638-39 (4th Cir. 1983), *rev'd on other grounds sub nom.* Cooper v. Federal Reserve Bank, 104 S. Ct. 2794 (1984); Mortensen v. Callaway, 672 F.2d 822, 824 (10th Cir. 1982); Smithers v. Bailor, 629 F.2d 892, 898-99 (3d Cir. 1980). *But see* Green v. United States Steel Corp., 570 F. Supp. 254, 274 (E.D. Pa. 1983) (disparate impact may be used to challenge multiple employment practices).

In *American Federation*, state employees who worked in job categories consisting of at least 70% female employees brought suit against the state under the disparate impact theory alleging, *inter alia*, that the state's practice of basing wages on competitive market rates, rather than on a theory of comparable worth, has a disparate impact on women. 770 F.2d at 1405. The Ninth Circuit held that "a compensation system that is responsive to supply and demand and other market forces is not the type of specific, clearly delineated employment policy contemplated by *Dothard* and *Griggs*." *Id.* at 1406 (citing Dothard v. Rowlinson, 433 U.S. 321 (1977)). Rather, the court concluded, "Such cases are controlled by disparate treatment analysis." *Id.*

In *Robinson*, black employees attacked Polaroid's layoff policy, which protected senior employees, under the disparate impact theory. 732 F.2d at 1010. The First Circuit held the theory to be inapplicable, since the plaintiffs had failed to demonstrate a causal relationship between the disproportionate number of black layoffs and the seniority rule. *Id.* at 1016. In *Federal Reserve Bank*, the EEOC charged the defendant with discriminating against blacks in promotion practices. 698 F.2d at 337. The Fourth Circuit held that the plaintiffs did not make out a prima facie disparate impact claim since no objective promotion criterion was under attack. *Id.* at 639. In *Mortensen*, the Tenth Circuit held that the plaintiff's disparate impact action failed because she failed to demonstrate that the low proportion of women in the position at issue resulted from a specific, facially neutral employment practice. 732 F.2d at 1014. In *Smithers*, a 64-year-old black male used the disparate impact theory to challenge the United States Postal Service's failure to hire him as a postmaster. 629 F.2d at 898-99. The Third Circuit rejected his claim, finding the theory unpersuasive because the applicant was unable to show that a specific hiring policy was the cause of the disproportionately low employment of blacks. *Id.* at 899.

15. *See* Griffin v. Carlin, 755 F.2d 1516, 1522-25 (11th Cir. 1985); Gilbert v. City of Little Rock, 722 F.2d 1390, 1396 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 2347 (1984).

For a discussion of *Griffin* and *Gilbert*, see *infra* notes 54-67 and accompanying text.

This note will examine the split among the circuits regarding the use of the disparate impact theory in this context. Part I reviews the initial development of title VII disparate impact analysis. Part II discusses the circuits' conflicting rationales for requiring or not requiring a plaintiff to identify the particular component of an employment system that causes a disparate impact before bringing an action based on that theory. Part III concludes that the *Pouncy* view—restricting the disparate impact theory to single-component attacks—should not be followed because it contravenes the congressional intent underlying title VII.

I. THE EVOLUTION OF DISPARATE IMPACT THEORY

Title VII actions may be based upon either of two legal theories, disparate treatment or disparate impact.[16] Disparate treatment is proved by showing that an employer intentionally treats an employee or

16. The distinction between the disparate treatment and disparate impact analyses has been explained clearly by the Supreme Court. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1979). In *Teamsters*, the Court noted:

> 'Disparate treatment' such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . . Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.
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> . . .
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> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involved employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive, we have held, is not required under a disparate-impact theory.

Id. at 335 n.115.

The Supreme Court has described the burden of proof in individual disparate treatment cases as follows:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a *prima facie* case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complaintant's qualifications. . . .
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> The burden then must shift to the employer to articulate some legitimate, non-discriminatory reason for the employee's rejection. . . .
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> [Plaintiff then] must . . . be afforded a fair opportunity to show that [defendant's articulated reason for] rejection was in fact pretext.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). *See generally* Belton, *Burdens of Pleading and Proof of Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1235-47 (1981) (referring to *McDonnell-Douglas* three-step formula as seminal articulation of allocation of burden of proof in disparate treatment cases); Player, *The Evidentiary Nature of Defendant's Burden in Title VII Disparate Treatment Cases*, 49 MO. L. REV. 17 (1984). For a dis-

applicant differently because of his or her race, color, sex, or national origin.[17] Proof of discriminatory intent is required under this theory.[18] Under the disparate impact theory, a plaintiff need only show that his or her employer is using an employment practice, that, although neutral on its face, in fact has an adverse effect upon individuals of a particular race, sex, or ethnic group.[19]

While the proof requirements of the classic disparate impact cases and disparate treatment cases are dissimilar, these differences become less significant where a plaintiff brings both a disparate treatment claim alleging a pattern or practice of discrimination[20] and a disparate impact claim. Both pattern or practice disparate treatment claims and disparate impact claims amount to an allegation "that an employer's practices have had a systematic adverse effect on members of the plaintiff class."[21] Once a plaintiff in a pattern or practice claim meets his initial burden of presenting statistical evidence sufficient to create a presumption of class-wide discrimination, the employer will ordinarily rebut this presumption by pointing to specific practices within the employment system causing the disparity.[22] Since these specific employment practices have been articulated by the employer in response to the prima facie pattern and practice claim, the essential elements of a disparate impact case are pres-

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cussion of the evidence necessary to establish a prima facie case of disparate impact, see *infra* notes 28-30 and accompanying text.

17. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1979).

18. *Id.* While proof of discriminatory intent is required under the disparate treatment theory, it can be inferred from circumstantial evidence showing differences in treatment. *Id.*

19. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

20. In a pattern or practice disparate treatment case, the plaintiff class must prove by a preponderance of the evidence that "discrimination was the company's standard operating procedure." International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977). To make an initial showing of disparate treatment in a pattern or practice case, the plaintiff must present statistical evidence of gross disparities in hiring or promotions. *Id.* at 339.

21. Segar v. Smith, 738 F.2d 1249, 1266 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2357 (1985).

22. The employer can rebut the presumption of discrimination in two ways. First, the employer can claim that no disparity exists by demonstrating that the plaintiff's statistics are inaccurate. International Bhd. of Teamsters v. United States, 431 U.S. 324, 339-40 (1977). If the employer fails to demonstrate a flaw in the plaintiff's statistics, then the employer must offer evidence of a legitimate, nondiscriminatory reason for the disparity. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1980). This rebuttal will typically require the defendant to pinpoint an employment practice that in fact caused the disparity. *Id.* at 258. Unlike the employer's burden of rebuttal in an individual disparate treatment claim, the assertion of a nondiscriminatory explanation without a factual basis will not rebut an inference of class-wide discrimination. *Id.* *See generally* Comment, *Defendant's Burden of Proof in Title VII Class Action Disparate Treatment Suits*, 31 AM. U.L. REV. 775 (1982).

ent.[23] Consequently, at least two circuits have held that if the plaintiffs are able to first establish a prima facie pattern and practice claim, traditional disparate impact analysis may be used in assessing the validity of the specific employment practices introduced by the employer to rebut the pattern or practice claim.[24] Thus, pattern and practice claims and

23. Segar v. Smith, 738 F.2d 1249, 1270 (D.C. Cir. 1984). *See also* Griffin v. Carlin, 755 F.2d 1516, 1528 (11th Cir. 1985) (citing *Segar*, 738 F.2d at 1249).

24. See, e.g., Griffin v. Carlin, 755 F.2d 1516, 1525-28 (11th Cir. 1985); Segar v. Smith, 738 F.2d 1249, 1270 (D.C. Cir.), *cert. denied*, 105 S. Ct. 2357 (1985). In *Segar v. Smith*, a class comprising black special agents employed by the federal Drug Enforcement Agency (DEA) brought title VII employment discrimination actions under both disparate treatment and disparate impact theories. *Id.* at 1260. Proceeding under the disparate treatment theory, the plaintiffs alleged that the entirety of DEA's employment system resulted in a pattern or practice of illegal discrimination. *Id.* at 1266. Using the disparate impact theory, plaintiffs challenged several of DEA's employment practices—including initial grade assignments, work assignments, supervisory evaluations, discipline, and promotion decisions. *Id.* at 1277. Based on the plaintiffs showing of disparity resulting from DEA's five specific employment practices, the court held that the promotion process had a disparate impact on blacks. *Id.* at 1288. Turning to the plaintiff's pattern or practice case, the District of Columbia Circuit held that because the employer had failed to rebut the presumption of discrimination established by plaintiffs, DEA had engaged in a pattern or practice of discrimination against black special agents. *Id.* Moreover, the court noted that even if DEA had successfully rebutted the disparate impact claim by pointing to a specific employment practice that explained the disparity, disparate impact analysis would be applicable to assess the validity of those practices. *Id.* The District of Columbia Circuit explained that as a result of the plaintiff's prima facie showing of disparity in a pattern and practice case and the defendant's rebuttal explanation of the disparity, the court would have had all the necessary components of a disparate impact claim. *Id.* The *Segar* court was not persuaded by the concern of the Fifth Circuit in *Pouncy* regarding the propriety of using a disparate impact theory in situations where the plaintiffs have not themselves identified specific employment practice(s) allegedly causing a disparity violative of title VII.

The two concerns of the Fifth Circuit in *Pouncy* were that (1) it would be unfair to force the defendant to identify the employment practice causing the adverse impact (since the initial burden in a disparate impact claim should be on the plaintiff); and (2) it could force the defendant to justify the entire range of its employment practices when a plaintiff shows only that a disparity exists. *See Segar*, 738 F.2d at 1270 (citing *Pouncy*, 668 F.2d at 800; Rivera v. City of Wichita Falls, 665 F.2d 531, 539 (5th Cir. 1982)). First, the *Segar* court explained that in the situation where the plaintiff has made out a prima facie pattern or practice case, there would, "the fears of the *Pouncy* court notwithstanding . . . [be no] additional burden of articulation" on the employer, since "to rebut the disparate treatment [pattern and practice] claim the employer will have had to articulate which employment practices cause an observed disparity." 738 F.2d at 1271. The *Segar* court countered the second concern of the Fifth Circuit by noting that an employer will not be required to validate every component of its employment system to rebut the plaintiffs' pattern and practice or disparate impact claim. *Id.* Rather, it would only be necessary for the employer to validate the components of its employment system that it identified as the source of the disparity. *Id.*

The *Segar* court supported its position by observing that employers have greater access, as well as greater insight into, the internal mechanisms of their employment system than employees. *Id.* This greater access and insight warrant requiring the defendant-employer to prove the business necessity of any employment practice, as well as requiring the employer to identify the specific em-

disparate impact claims may converge in such a way that both may be applied concurrently to the same factual situation.

The traditional disparate impact theory was first developed in *Griggs v. Duke Power Co.*[25] In *Griggs*, the plaintiff alleged that his employer's policy of requiring a high school diploma or a passing score on a high school equivalency test, before processing any employee's departmental transfer request, had a disparate impact on black employees.[26] The United States Supreme Court held that title VII prohibits the employer's use of any facially neutral employment practice or criterion having a discriminatory impact on a protected class unless the employer can prove that such practice or criterion bears a demonstrable relationship to performance of the job.[27]

In contrast to the disparate treatment theory, the disparate impact theory focuses on the result of, rather than the motivation for an employment procedure.[28] The plaintiff does not need to prove an intent to discriminate, but only that a facially neutral standard underlying the procedure operates to exclude members of the protected class at a disproportionate rate.[29] The burden then shifts to the employer to show

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ployment practice(s) having an adverse impact. *Id.* The court emphasized that placing the burden on the plaintiff to identify the specific procedure causing the disparity would defeat the purpose of title VII—"to achieve equality of opportunity by rooting out 'artificial, arbitrary, and unnecessary' employer-created barriers to professional development." *Id.* (quoting Connecticut v. Teal, 457 U.S. 440, 451 (1982)).

The Eleventh Circuit has adopted the analysis of the *Segar* court. *See* Griffin v. Carlin, 755 F.2d 1516, 1528 (11th Cir. 1985). For a discussion of the facts of *Griffin*, see *infra* notes 56-58 and accompanying text.

25. 401 U.S. 424 (1971).

26. *Id.* at 425-26.

27. *Id.* at 431. The Court stated:

> [Title VII] proscribes not only overt discrimination but also practices which are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

Id. For a discussion of the importance of *Griggs* in breaking down the barriers of discrimination and promoting equal employment opportunity, see Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972).

28. *Griggs*, 401 U.S. at 432. The *Griggs* Court stated that

> good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability. . . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.

Id. (emphasis supplied by Court).

29. *Id.* at 432. The courts and the agencies that enforce federal civil rights statutes primarily have relied on two methods for determining if the requisite discriminatory impact has been proved. The first, known as the four-fifths rule,

that the procedure bears a demonstrable relationship to an individual's job performance, and thus qualifies as a "business necessity."[30]

The Supreme Court further developed the disparate impact theory in *Albemarle Paper Co. v. Moody*.[31] In *Albemarle*, the plaintiff alleged that

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is found in the Uniform Guidelines on Employee Selection Procedures (Guidelines). 29 C.F.R. § 1607.4(D) (1984). In the Guidelines, the Equal Employment Opportunity Commission and all other enforcement agencies of the federal civil rights statutes adopt the view that if a selection rate for any race, sex, or ethnic group is less than four-fifths (80%) of the figure for the group with the highest selection rate, then the complainant employee has shown a prima facie case of disparate impact. *Id.* It is important to note that the Guidelines are only applicable to prosecutorial actions taken by federal agencies, and not to the federal courts. M. ALBUM & T. GIES, *supra* note 1, at 159. However, some courts have relied on the four-fifths rule. *See, e.g.*, Firefighters Inst. for Racial Equality v. City of St. Louis, 616 F.2d 350 (8th Cir. 1980), *cert. denied*, 452 U.S. 938 (1981). Other courts have used the standard deviation method to determine if variations in hiring or promotions amount to a showing of disparate impact. *See* Hazelwood School Dist. v. United States, 433 U.S. 299 (1977); Castaneda v. Partido, 430 U.S. 482 (1977). Under the standard deviation method, a statistical disparity which exceeds two or three standard deviations between the expected number (absent discrimination) and the actual number of minority employees hired or promoted, establishes disparate impact. An in-depth discussion of the mechanics of this statistical method is beyond the scope of this note. For a more detailed discussion of the standard deviation method, see *Hazelwood*, 433 U.S. at 308-09 n.14.

30. *Griggs*, 401 U.S. at 431. In *Griggs*, the Court determined that the high school diploma requirement and the general intelligence test that had an adverse impact on the hiring of blacks were not necessary to the conduct of business and thus was improper. *Id.* The court held that in order for an employment practice to be upheld it must be "shown to bear a demonstrable relationship to successful performance of the jobs for which it was used." *Id.*

Following the Court's articulation of the business necessity defense in *Griggs*, the courts have differed on the necessary standard of proof. *See* Contreras v. City of Los Angeles, 656 F.2d 1267, 1275-76 (9th Cir. 1981) ("courts differ on just what an employer must prove to discharge its burden [of proving business necessity]"), *cert. denied*, 455 U.S. 1021 (1982); Willborn, *supra* note 9, at 803 (business necessity standard is unclear limit on disparate impact theory); Comment, *The Business Necessity Defense to Disparate-Impact Liability Under Title VII*, 46 U. CHI. L. REV. 911, 912 (1979) (courts take both restrictive and broad approach to business necessity). Thus, courts have differed on the weight of the employers' burden. While courts differ as to the definition of business necessity, it is clearly a greater burden on the defendant than that required of the defendant in a disparate treatment case. Under the individual disparate impact case the employer only has the burden "to articulate some legitimate, nondiscriminatory reason" for the adverse action. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). For instance, a nondiscriminatory reason for disparate promotions would be that the plaintiff was less qualified than persons chosen for promotion. *See, e.g.*, Page v. Bolger, 645 F.2d 227, 230 (4th Cir. 1981).

A detailed survey of the business necessity defense is beyond the scope of this note. For a more detailed discussion of the this defense, see generally B. SCHLEI & P. GROSSMAN, *supra* note 1, at 1328-30; Note, *Business Necessity: Judicial Dualism and the Search for Adequate Standards*, 15 GA. L. REV. 376 (1981) (strict requirements for job necessity will best serve purpose of title VII); Comment, *supra*.

31. 422 U.S. 405 (1975). In *Albemarle*, the Court held that employers asserting a business necessity defense to a disparate impact challenge must prove that

his employer's use of general ability tests, on which a minimum score was required before an employee could be considered for a particular position, had a disparate impact on blacks.[32] The Court held that since the employer failed to show the tests were job-related, their use would be prohibited.[33] More importantly, the Court held that although an employer may overcome the plaintiff's prima facie case by proving the procedure at issue is job-related,[34] a plaintiff may nevertheless prevail in demonstrating that other, non-discriminatory methods exist by which the employer could reach his goal of obtaining qualified employees.[35]

More recently, in *Connecticut v. Teal*[36] the Supreme Court held that employers cannot defend the use of employment practices or criteria which have an adverse impact on a protected group at certain stages simply by alleging that the overall employment process does not produce a disparate impact on that group.[37] Under *Teal*, an individual

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the employment practice is significantly correlated with relevant work behavior. *Id.* at 431. The employer was unable to make any showing that the challenged tests measured a skill necessary to proper performance of the job. *Id.* at 412.

32. *Id.* at 410-11.

33. *Id.* at 435-36. Under the disparate impact theory the employer must validate the practice, i.e., prove that the challenged practice is manifestly related to job performance. *Id.* at 425 (citing *Griggs*, 401 U.S. at 432).

There are three methods of proving that the challenged practice is related to job performance: criterion validation (comparing test results with subsequent job performance), content validation (devising a test that measures the knowledge and skill required for efficient job performance), and construct validation (identifying general mental and psychological characteristics that are determined important in job performance and utilizing employment criteria related to such traits). M. ALBUM & T. GIES, *supra* note 1, at 169-72. *See generally* B. SCHLEI & P. GROSSMAN, *supra* note 1, at 162-90; Doverspike, Barrett & Alexander, *The Feasibility of Traditional Validation Procedures for Demonstrating Job Relatedness*, 9 LAW & PSYCHOLOGY REV. 35 (1985); Gwartney, Asher, Haworth & Haworth, *Statistics, the Law and Title VII: An Economist's View*, 54 NOTRE DAME LAW. 633 (1979) (criticism of test validation procedures).

34. 422 U.S. at 425. To establish a prima facie case of disparate impact, the *Albermarle* Court noted that the employee must show that the practice in question selects applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants. *Id.*

35. *Id.*

36. 457 U.S. 440 (1982).

37. *Id.* at 453-54. In *Teal*, black state employees claimed, under the disparate impact theory, that a written promotion examination discriminated against them on account of their race in violation of title VII. *Id.* at 443-44. In order to obtain a permanent promotion as a supervisor, the applicant had to first pass a written examination. *Id.* at 443. Plaintiffs, having failed the written examination, were excluded from consideration for the permanent position. *Id.* However, the lower court found that although the passing rates for the written exam alone manifested an adverse impact upon blacks, the overall selection process resulted in a non-adverse impact on blacks since blacks were selected at a higher rate than whites. *Id.* at 445. The employer claimed that this overall nondisparate result was a complete defense to the employees' suit. *Id.* at 442. The Supreme Court rejected this argument, noting that it "ignores the fact that Title VII guarantees these individual respondents the *opportunity* to compete equally

plaintiff has a better chance of success in a disparate impact challenge since the employer is prevented from using this "bottom line" defense.[38] The only way for an employer to avoid liability in such instances is to demonstrate that the particular practice in question is not an artificial, arbitrary, or unnecessary employer-created barrier to the professional development of the protected group.[39]

The *Griggs* decision, which introduced the disparate impact theory and its progeny, involved only one specific, objective employment criterion: the use of a standardized intelligence test or a high school diploma as a prerequisite for interdepartmental transfers.[40] Because of the narrow factual context in which the disparate impact theory was developed, there is much debate concerning the theory's expanded use in other situations. One example is the dispute over whether the disparate impact theory may be used to challenge a multicomponent employment system where the plaintiff has been unable to identify any specific practice as the source of the discrimination.[41]

II. APPLYING THE DISPARATE IMPACT THEORY TO CHALLENGE MULTICOMPONENT EMPLOYMENT SYSTEMS

A. *Cases Refusing to Apply the Theory:* Pouncy v. Prudential Insurance Co.

To date, five federal circuits[42] led by the Fifth Circuit in *Pouncy v.*

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with white workers on the basis of job-related criteria." *Id.* at 451 (emphasis added by Court).

38. The "bottom line" defense is used by employers to argue that an overall employment process having an equal impact upon members of the protected group is not subject to attack under the disparate impact theory. *See generally* M. ALBUM & T. GIES, *supra* note 1, at 161-69; Rigler, Connecticut v. Teal: *The Supreme Court's Latest Exposition of Disparate Impact Analysis*, 59 NOTRE DAME L. REV. 313 (1984) (characterizing *Teal* as focusing on classifications and limitations rather than jobs and promotions); Comment, Connecticut v. Teal: *Extending Griggs Beyond the Bottom Line*, 44 U. PITT. L. REV. 751 (1983) (characterizing *Teal* as evidence of Court's continuing dedication to removal of discriminatory barriers).

39. *Teal*, 457 U.S. at 451.

40. *Griggs*, 401 U.S. at 427-28. *Cf.* Dothard v. Rawlinson, 433 U.S. 321 (1977) (also involving title VII challenge to specific objective employment criterion).

41. D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION § 1.23, at 22 (Supp. 1984). Baldus and Cole note:

> The limits of the domain of the disparate impact doctrine continue unsettled. The most noteworthy issue concerns the applicability of the doctrine outside the narrow context in which it was originally developed in *Griggs v. Duke Power Co.* In *Griggs*, the doctrine was applied to overt, clearly identified nondiscretionary criteria whose effects could be isolated from those of other criteria in the selection process.

Id. For a discussion of additional limits on the disparate impact theory, see generally Willborn, *supra* note 9.

42. The First, Third, Fourth, Ninth, and Tenth Circuits have followd *Pouncy*. For a discussion of the relevant cases, see *supra* note 14.

Prudential Insurance Co.[43] have held that disparate impact analysis is not an appropriate device for broad-based attacks on multicomponent employment systems.[44] In *Pouncy*, a former black insurance worker alleged, *inter alia*, that his employer discriminated against black employees in considering promotions.[45] In particular, Pouncy claimed that three employment practices—failure to post job openings, use of a level system,[46] and use of subjective criteria to evaluate employees—caused the observed disparate impact.[47] The Fifth Circuit determined that Pouncy failed to present a prima facie case of disparate impact[48] because he failed to prove statistically that the observed underrepresentation of blacks in upper level positions was due to a single, identifiable employment practice.[49]

Judge Reavley, writing for the majority in *Pouncy*, explained that under the disparate impact theory a proof that the end product of an employment system results in disparity is insufficient.[50] Instead the court "require[s] proof that a specific practice results in a discriminatory impact on a class in an employer's workforce in order to allocate fairly the parties' respective burdens of proof at trial."[51] The court noted that to hold otherwise would require the employer to validate all the components of his entire employment system.[52] Other circuits embracing the

43. 668 F.2d 795 (5th Cir. 1982).

44. *Id.* at 800. The *Pouncy* court stated:

> The discriminatory impact model of proof in an employment discrimination case is not . . . the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices. . . . The disparate impact model applies only when an employer has instituted a specific procedure, usually a selection criterion for employment, that can be shown to have a causal connection to a class based imbalance in the work force.

Id. at 800.

45. *Id.* at 797.

46. Plaintiff acknowledged that his employer had no experience or educational prerequisites for hires into its entry-level positions, but claimed that blacks were concentrated in the very lowest jobs in the level system and were absent in the upper-level jobs. Pouncy v. Prudential Ins. Co., 499 F. Supp. 427, 442 (S.D. Tex. 1980). Prudential's level system consists of classification of its various departments into 300 to 350 job titles. *Id.* at 446. Personnel in each division write a job description of each position. *Id.* The personnel department evaluates the position according to a point system and assigns a level to each job. *Id.* Each level also has a minimum and maximum range of salaries. *Id.* The plaintiff claimed that blacks are often hired at the entry level and receive the least skilled and lowest paying positions within that level. *Pouncy*, 668 F.2d at 799.

47. 668 F.2d at 799.

48. *Id.* at 801. The court explained that "a prima facie case is shown by identification of a neutral employment practice coupled with proof of its discriminatory impact on the employer's work force." *Id.* at 800.

49. *Id.* at 801-02.

50. *Id.*

51. *Id.*

52. *Id.* at 801. The Fifth Circuit reasoned:

Pouncy doctrine have similarly held that the plaintiff must identify a specific procedure resulting in disparate impact in order to have a cognizable claim.[53]

B. *Cases Applying the Theory:* Griffin v. Carlin

At present, two federal circuits courts have held that a plaintiff may use the disparate impact theory to challenge a multicomponent employment system as a whole.[54] The leading case advocating application of the disparate impact theory in this context, *Griffin v. Carlin*[55] provides a thorough analysis of this issue.

The Eleventh Circuit, in *Griffin*,[56] considered an attack on a multicomponent employment system.[57] In *Griffin*, several employees at-

> We do not permit a plaintiff to challenge an entire range of employment practices merely because the employer's work force reflects a racial imbalance that might be causally related to any one or more of several practices for to do so "would allow the disparate impact of one element to require validation of other elements having no adverse effects. The burden of determining the validity of a screening procedure, weighing not only on the employer but also on the limited resources of the district court, will not be imposed where proof of an absence of discriminatory effect attributable to the procedure shows it to be unwarranted."

Id. (quoting Rivera v. City of Wichita Falls, 665 F.2d 531, 539 (5th Cir. 1982)). For a discussion of other rationales for limiting the disparate impact analysis to challenges of specific employment criteria, see Willborn, *supra* note 9, at 829-31.

53. For a discussion of the cases following *Pouncy*, see *supra* note 14 and accompanying text.

54. *See supra* note 15. The Eighth and Eleventh Circuits have held the disparate impact analysis to be applicable to challenge the various components of an employment system simultaneously. In *Gilbert*, black police officers brought an action against the City of Little Rock and others, claiming discrimination by the Little Rock Police Department, specifically in its promotion system. 722 F.2d at 1393. The Eighth Circuit held that the lower court's analysis was erroneous because it failed to focus on the effect of the interrelationship of numerous employment practices on the employment system as a whole. *Id.* at 1396.

55. 755 F.2d 1516 (11th Cir. 1985).

56. *Id.*

57. *Id.* at 1519. Plaintiffs filed a class action suit in 1972 challenging their employer's use of discriminatory grade assignment and promotion methods. *Id.* In 1973, the court granted plaintiffs permission to proceed as representative of a class but dismissed the portion of the suit that challenged the use of a written test in the promotion procedure. *Id.* In 1976, plaintiff Griffin, a black employee was fired. *Id.* He appealed the discharge to the United States Civil Service Commission claiming discrimination because of race. *Id.* On the district court's order a consolidated claim was filed in 1981. *Id.* at 1520. In 1982, the district court granted defendant's motion to dismiss all claims based on disparate impact theory because the plaintiffs' pleadings had not given the employer notice of the specific objective employment practices being challenged. *Id.* The case proceeded to trial on the disparate treatment theory alone. *Id.* The plaintiffs appealed the district court's dismissal of the challenge to written tests used in the promotion system, exclusion of their disparate impact claims and findings of no disparate treatment. *Id.*

tempted to apply the disparate impact theory to challenge a multicomponent promotion system.[58] The *Griffin* court rejected the concerns expressed by the Fifth Circuit in *Pouncy*, and held that the disparate impact analysis is an appropriate vehicle for attacking an entire employment system.[59]

In support of its position, the Eleventh Circuit noted that the Supreme Court in *Griggs* frequently referred to employment "practices" and "procedures," terminology that embraces more than single elements of an employment system.[60] The *Griffin* majority also noted that, when given the opportunity in *Connecticut v. Teal*,[61] the Supreme Court declined to expressly mention or to imply that disparate impact analysis was inappropriate for challenging an entire employment system.[62] In particular, the Eleventh Circuit noted that the *Teal* Court cited a Senate report[63] which described employment discrimination as a "complex and pervasive phenomenon" involving "systems" and "effects."[64]

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58. *Id.* at 1522. Plaintiffs in their disparate impact claims challenged the promotion process as a whole and several components of that system including promotion advisory boards, details (temporary assignments to higher level positions to substitute for absent employees), awards, and discipline. *Id.* The Eleventh Circuit held that the district court erred in limiting the application of the disparate impact theory to single objective employment practices. *Id.* at 1525.

59. *Id.* at 1523-24. The court found ample binding precedent in the Fifth Circuit to require application of a disparate impact analysis. *See id.* at 1523 (citing cases). Even if these cases were not binding, the Eleventh Circuit stated that it would have rejected the *Pouncy* rationale based on subsequent decisions. *Id.* at 1523-24 & 1524 n.6 (citing, *inter alia*, *Page v. United States Indus.*, 726 F.2d 1038 (5th Cir. 1984)). The court noted that although several subsequent Fifth Circuit cases have followed *Pouncy*, the Fifth Circuit applied disparate impact analysis to a subjective promotion sytem in *Page v. United States Indus.*, 726 F.2d 1038 (5th Cir. 1984). 755 F.2d at 1524 n.6. In *Page*, a class of black and Mexican-American employees of U.S. Industries brought claims under the disparate threatment theory and disparate impact theory alleging that their employer's promotion, job placements, initial work assignment, and wages were discriminatory. 726 F.2d at 1041-42. The court applied the disparate impact analysis to to the employer's subjective employment system, which included the following components: (1) the foreman's determination as to whether the employee could take the requisite tests for promotion; (2) welding tests; and (3) the foreman's determination of whether the employee had the requisite mathetmatical skills for promotion. *Id.* at 1043. The Court held that although the disparate impact theory may be applied to a subjective promotion system, the plaintiffs had failed to show the requisite adverse impact. *Id.* at 1054.

60. *Id.* at 1524.

61. 457 U.S. 400 (1982). for a discussion of *Teal*, see *supra* notes 36-38 and accompanying text.

62. 755 F.2d at 1524 (citing *Teal*, 457 U.S. at 448-52).

63. *See* S. REP. No. 415, 92d Cong., 2d Sess. 5 (1971).

64. 755 F.2d at 1524 (citing *Teal*, 457 U.S. at 447 n.8). The *Griffin* court emphasized that even the dissenters in *Teal* conceded that disparate impact analysis was applicable in challenges to entire employment systems. The court stated:

> The dissenters in *Teal*, while disagreeing with the Court's conclusion that the bottom line could not be used as a defense, clearly indicated

The *Griffin* court emphasized that, on a practical level, prohibiting the general attack of a multicomponent employment system under the disparate impact theory would "completely exempt the situation in which an adverse impact is caused by the interaction of two or more components."[65] Finally, the court further pointed out that the Uniform Guidelines of Employer Selection Procedures[66] construe the disparate impact analysis as appropriate for challenging more than a single component of an employment system.[67]

III. ANALYSIS

As the existing body of case law indicates, the scope of the applicability of the disparate impact analysis remains uncertain.[68] An inherent problem with the concurrent development of two theories of discrimination—disparate impact and disparate treatment—is the interaction[69] between and factual application of each respective theory.[70] At present, one of the most noteworthy controversies involves the applicability of the disparate impact analysis beyond the prototypical case in which the plaintiff challenges "overt, clearly identified nondiscretionary criteria . . . in the selection process."[71] To date, the Supreme Court has only ap-

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> their understanding that disparate impact challenges could be made to the total selection process. The dissenters stated that 'our disparate-impact cases consistently have considered whether the result of an employer's *total selection process* had an adverse impact on the protected group.'

Id. at 1524-25 (quoting *Teal*, 457 U.S. at 458 (Powell, J., dissenting)) (emphasis in original).

65. 755 F.2d at 1525.

66. 29 C.F.R. § 1607 (1984).

67. 755 F.2d at 1525. The court explained that the Guidelines define the selection procedures to which the disparate impact theory applies as follows:

> Any measure, combination of measures, or procedure used as a basis for any employment decision. Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational, and work experience requirements through informal or casual interviews and unscored application forms.

Id. (quoting 29 C.F.R. § 1607.16(Q) (1984)).

68. For a discussion of the boundaries of the disparate impact theory as defined by case law, see *supra* notes 40-41 and accompanying text. *See also* D. BALDUS & J. COLE, *supra* note 41, § 1.23, at 22 (suggesting that disparate impact theory is appropriate for challenging multicriteria employment practices and highly subjective employment criteria).

69. For a further discussion of the interaction between the disparate impact and disparate treatment theories, see C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION § 1.14, at 30-35 (1980).

70. As one commentator has noted, "no clear standard has yet been developed by the courts to identify the factual situations in which disparate impact claims will lie." D. BALDUS & J. COLE, *supra* note 41, § 1.2, at 46 (1980).

71. *Id.* § 1.23, at 22 (Supp. 1984).

plied the disparate impact theory to analyze challenges to specific objective employment practices, such as aptitude and intelligence tests,[72] educational requirements,[73] and height and weight requirements.[74] However, the language and purpose of title VII as interpreted by the courts,[75] as well as other practical implications,[76] support a broadening of the use of a disparate impact analysis to include attacks on multicomponent employment systems.

A. *Statutory Language and Policies Underlying Title VII*

Title VII strictly prohibits any employment practice that "in any way" discriminates on the basis of race, color, religion, sex, or national origin.[77] By expressly stating that employment practices "in any way"[78] resulting in discrimination are prohibited, the drafters of title VII indicated their intent that the statute protect against discriminatory employment practices regardless of whether they result from a single employment criterion or the interaction of several employment criteria. Furthermore, as the Supreme Court in *Griggs* stated, "What Congress has commanded is that *any test* used [by the employer] must measure the person for the job and not the person in the abstract."[79] The *Griggs* Court concluded that title VII prohibits "procedures" or "mechanisms" that result in a disparate impact on minority groups, language that may include more than just specific, isolated components of an employment system.[80] Thus, both the language of title VII,[81] as well as its purpose as interpreted by the Supreme Court in *Griggs*,[82] indicate that *any* practices or procedures, not merely isolated, single components of an em-

72. *See Griggs*, 401 U.S. at 427 (requirement of high school education and satisfactory scores on aptitude test).

73. *See id.*

74. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977) (action challenging employer's height and weight selection criteria that qualified disproportionately low number of women).

75. For a discussion of the purpose of title VII as interpreted by the courts, see *supra* note 4 and accompanying text.

76. For a discussion of the practical implications of refusing to apply disparate impact analysis to multicomponent employment practices, see *infra* notes 86-93 and accompanying text.

77. 42 U.S.C. § 2000e-2 (1982). For the text of this section, see *supra* note 3.

78. 42 U.S.C. § 2000e-2 (1982).

79. 401 U.S. at 435.

80. *Id.* at 436. More recently, the Court cited a Senate report endorsing *Griggs*, which recognized that "[e]mployment discrimination as viewed today is a . . . complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs." *Teal*, 457 U.S. at 447 n.8 (quoting S. REP. NO. 92-415, 92d Cong., 2d Sess. 5 (1971)).

81. For the relevant text of title VII, see *supra* note 3.

82. For a discussion of the purpose of title VII as interpreted by the *Griggs* Court, see *supra* note 27 and accompanying text.

ployment system, are unlawful if they result in a disparate impact on a protected group. Consequently, it should be sufficient for an employee to identify the general employment system resulting in a disparate impact, rather than specifying each of its components, in order to have a cognizable claim.

It is suggested that the *Pouncy* doctrine, which requires a disparate impact claimant to attack a specific identifiable employment practice, frustrates the avowed purpose of title VII.[83] Adopting such a limitation on the disparate impact theory allows complex, multifaceted employment systems to remain as barriers to the equality for employment opportunities Congress sought to secure under title VII.[84] More importantly, it is in a complex factual context that discrimination is most likely to occur because as the number of criteria increase there are more sources from which bias may potentially enter the employment system.[85] Thus, the expansion of the disparate impact theory to include challenges to multicomponent employment systems, as suggested by the *Griffin* and *Gilbert* courts, would eliminate some of the remaining barriers to equal employment opportunities beyond those resulting from a single, easily identified employment practice.

B. *Practical Implications of Limiting the Application of Disparate Impact Analysis to a Single Specific Employment Criterion*

Although the statutory language and judicial interpretation of title VII provide compelling reasons not to restrict the use of the disparate impact analysis, a few circuits have done so, arguing that disparate impact is an inappropriate basis on which to attack a multicriteria employment system.[86] Advocates of this position, led by the *Pouncy* court, urge that the use of the theory in cases challenging multicriteria employment

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83. *See* Segar v. Smith, 738 F.2d 1249, 1271 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2357 (1985).

84. *Id.* at 1271-72. The *Segar* court explained:

> This purpose is not well served by a requirement that the plaintiff in every case pinpoint at the outset the employment practices that cause an observed disparity between those who appear to be comparably qualified. Such a requirement in effect permits challenges only to readily perceptible barriers; it allows subtle barriers to continue to work their discriminatory effects, and thereby thwarts the crucial national purpose that Congress sought to effectuate in Title VII.

Id.

85. *See* Green v. United States Steel Corp., 570 F. Supp. 254, 274 (1983). In *Green*, the court noted that discrimination is most likely to occur in complex multicomponent employment systems because such systems are likely to employ several subjective components that, when applied, may be colored by an employer's conscious or unconscious bias toward a particular group. *Id.*

86. For a discussion of circuits prohibiting the use of the disparate impact theory in cases challenging multicomponent employment practices, see *supra* notes 42-51 and accompanying text.

systems would unfairly burden an employer[87] by requiring it to prove the business necessity of each component of its entire employment system whenever disparate impact is alleged.[88] However, as one court has noted, in the situation in which the plaintiff establishes a prima facie disparate treatment claim along with a systemic disparate impact claim, an employer's burden is not increased, since the employer already will have had to identify the source of the discriminatory result as part of its defense to the companion disparate treatment claim.[89]

Moreover, the plaintiff is often unable to obtain the information concerning his employer's system that is necessary to meet his burden of specifying the particular practice causing the disparate impact.[90] The employer "will possess knowledge far superior to that of the plaintiff as to precisely how its employment practices affect employees" and should consequently bear the burden of identifying the specific practice causing

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87. 668 F.2d at 795. The *Pouncy* court explained the employer's burden as follows:

> We require proof that a specific practice results in a discriminatory impact on a class in an employer's work force in order to allocate fairly the parties' respective burdens of proof at trial. The aggrieved party must prove a disparate impact due to the selection procedure. The employer then has the burden of proving that the selection procedure is justified by a legitimate business reason. Identification by the aggrieved party of the specific employment practice responsible for the disparate impact is necessary so that the employer can respond by offering proof of its legitimacy.

Id. at 800-01 (citations omitted).

88. For a discussion of the allocation of burdens of proof for plaintiff and defendant in a disparate impact case, see *supra* notes 29-30 and accompanying text.

89. *Segar v. Smith*, 738 F.2d at 1271. The *Segar* court noted that normally disparate impact and pattern or practice disparate treatment claims are brought together since both share "the allegation that an employer's practices have had a systematic adverse effect on members of a plaintiff's class." *Id.* at 1266. For a further discussion of *Segar*, see *supra* notes 21 & 23-24 and accompanying text. *See also* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1979) ("Either theory may, of course, be applied to a particular set of facts."); Carpenter v. Stephen F. Austin State Univ., 706 F.2d 608, 619 (5th Cir. 1983) (disparate impact theory and disparate treatment theory may be applicable to same set of facts); Jackson v. Seaboard Coast Line Ry., 678 F.2d 992, 1014 (11th Cir. 1982) (disparate impact and disparate treatment theories are both proper methods for proving discriminatory employment practices); Wright v. National Archives & Records Serv., 609 F.2d 702, 711 (4th Cir. 1979) (disparate impact and disparate treatment are "alternative theories upon which a right to relief under Title VII may be established in a given case"). For a discussion of the employer's burden of proof in a disparate treatment case, seek *supra* note 20 and accompanying text.

90. *Segar v. Smith* 738 F.2d at 1271. *See* D. BALDUS & J. COLE, *supra* note 41, § 1.23, at 24 ("When a . . . multistage selection process produces an overall disparate impact, but a lack of data limits the plaintiff's ability to prove its source, the plaintiff's burden of proof should be satisfied with proof of overall disparate impact.").

the disproportionate impact.[91] This solution places the burden of proof on the party with the best access to the data critical to the causation issue—the employer.[92] Allocating the burden of proof to the employer by authorizing use of the disparate impact theory also prevents employers from evading the mandate of title VII by developing complex, multifaceted employment systems that might otherwise prove difficult for an employee to analyze and attack.[93]

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91. *Segar v. Smith*, 738 F.2d at 1271. *See also* D. BALDUS & J. COLE, *supra* note 41, § 1.23, at 24.

92. *Segar v. Smith*, 738 F.2d at 1271.

93. *See* Green v. United States Steel Corp., 570 F. Supp. 254, 274 (E.D. Pa. 1983). The *Green* court stated:

> If defendant were correct in its legal position, relying on *Pouncy*, any employer could immunize its hiring, promotional and lay-off selection systems from class-action attack simply by making them as standardless as possible, by diffusing responsibility for making employment decisions among as many individuals as possible, and by failing to review the results of those individuals' exercise of discretion. As *Rowe* and its progeny have recognized, it is precisely in this sort of setting that discrimination is most likely to occur.

Id.

One practical result of adherence to the *Pouncy* decision is the immunization of many upper level employment practices from disparate impact attack because such practices are more likely multifaceted and thus it is difficult to identify the specific source of the disparity. *See* Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947, 998-99 (1982).

According to Professor Bartholet:

> Differences between upper and lower level jobs and job systems will require some creativity if traditional title VII standards are to be adapted and applied on the upper level. . . . Selection Systems on the upper level are also likely to be multifactored and discretionary, and therefore more difficult to analyze, while lower level systems often rely on a few absolute, objective requirements—attaining a score above the cutoff on a civil service test, passing a physical examination or possessing a high school diploma.
>
> Given these differences, the courts must develop new methods for assessing both the job relatedness and the racial impact of upper level selection systems.

Id. (footnotes omitted). Bartholet suggests that the courts take advantage of computer technology and sophisticated statistical methods, such as multiple regression, to analyze complex, subjective systems in order to determine what factors are important in decision-making. *Id.* at 999. A multiple regression analysis allows one to determine the degree to which each of a number of factors influences an employment decision. M. ALBUM & T. GIES, *supra* note 1, at 329. Under the multiple regression model, a certain dependent variable, such as promotion, is a linear mathematic function of other independent variables such as seniority, a score on a written test and so forth. *Id.* The main advantage of regression analysis is its ability to "control" for a number of factors that operate simultaneously in an employment decision. *Id.* at 330-31. In other words, this statistical method permits one to determine the degree to which one factor, for instance, race or sex alone, affects an employee's promotion. *Id.* at 331. *See* Vuyanich v. Republic Nat'l Bank, 505 F. Supp. 224 (N.D. Tex. 1980) (explanation of mechanics of regression analysis, as well as other statistical techniques utilized to determine influence of various factors in employment system), *vacated*, 723 F.2d 1195 (5th Cir. 1984). *See generally* D. BALDUS & J. COLE, *supra* note

It is therefore submitted that the plaintiff in a disparate impact case should be required to prove only overall disparate impact (disparity at the "bottom line") and that the employer, who has greater insight into and access to the system, should have the burden of identifying the specific components of the employment system causing the disparate impact.[94] This approach is more equitable and fair than requiring an employee to identify the source of the discrimination, since it places the burden of identification on the party with the better knowledge of the employment system. Under this approach an employer is no longer able to insulate his employment system from civil scrutiny merely by making it as complex and multifaceted as possible. Thus, subjecting multicriteria, nonspecific employment systems to disparate impact analysis brings more equitable results, consistent with the purpose of title VII and in keeping with the Supreme Court's declaration that title VII re-

41; Barnes, *The Problem of Multiple Components or Divisions in Title VII Litigation: A Coment*, LAW & CONTEMP. PROBS., Autumn 1983, at 185; Boardman & Vining, *The Role of Probative Statistics in Employment Discrimination Cases*, LAW & CONTEMP. PROBS., Autumn 1983, at 189; Finkelstein, *The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases*, 80 COLUM. L. REV. 737 (1980); Fisher, *Multiple Regression in Legal Proceedings*, 80 COLUM. L. REV. 702 (1980); Follett & Welch, *supra* note 1, at 171; Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal*, 89 HARV. L. REV. 387 (1975). Therefore, should an employer have a complex multicomponent sytem which is unfamiliar to an employee, a competent statistician may pinpoint the effect of each component of the entire system. M. ALBUM & J. GIES, *supra* note 1, at 329. Moreover, as the courts and at least one commentator have noted, the employer, having the greatest access to and understanding of his employment process, is in the best positoin to identify the factors or independent variables which must be "plugged into" a regression analysis. *See, e.g.*, Segar v. Smith, 738 F.2d 1249, 1271 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2357 (1985); D. BALDUS & J. COLE, *supra* note 41, § 1.23, at 24.

94. *See* Green v. United States Steel Corp., 570 F. Supp. 254, 274 (E.D. Pa. 1983). In *Green*, the court stated:

> In this case, plaintiffs proved that they are black; that they applied for jobs for which they possessed the minimal qualifications; that they are rejected, although others were hired; and that the hiring selection process under which they were rejected selected blacks for hire significantly less often then whites, in comparison to the racial make-up of the applicant pool. Further refinement of plaintiffs' *definition of the hiring selection system they attack was made impossible by defendant's own refusal to be pinned down as to the selection criteria it employs, beyond listing the twenty subjective criteria set forth in Finding of Fact No. 39 and stating that these criteria were applied as an 'amalgram.'* Under these circumstances, I conclude that plaintiffs have made out a prima facie case of disparate impact, and that it is fair to turn to the defendant for some justification of a selection process which produces apparently discriminatory results.

Id. (footnote omitted) (emphasis added). *See also* D. BALDUS & J. COLE, *supra* note 41, § 1.23, at 24. For a discussion of the traditional burden of proof requirements in a disparate impact case, see *supra* note 29-30 and accompanying text.

quires "the removal of artificial, arbitrary and unnecessary barriers to employment"[95] that are discriminatory in effect.

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95. *Griggs*, 401 U.S. at 431.